

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

74-1299

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Pages

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

.....

No. 74 Cr. 38

.....

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

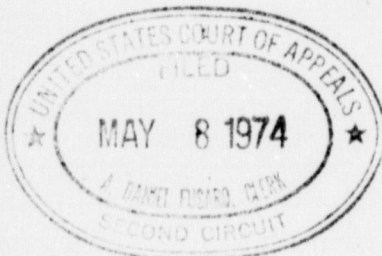
DERYL WILSON,

Defendant-Appellant.

.....

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR DEFENDANT-
APPELLANT



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MADE IN U.S.A.
IN THE
UNITED STATES COURT OF APPEALS

For the Second Circuit

NO. 74 Cr. 38
.....

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

DERYL WILSON,
Defendant-Appellant.
.....

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
.....

BRIEF FOR DEFENDANT-APPELLANT
.....

PRELIMINARY STATEMENT

Defendant-Appellant appeals from a judgment of conviction on March 1, 1974, in the United States District Court for the Southern District of New York of Count I of the Federal indictment against him charging under Count I, Violation of Sections 812,841 (a)(1) and 841 (b)(1)(A) of Title 21, of the United States Code, Conspiracy to violate the Narcotics laws, and under Count II, unlawful possession and distribution of narcotics in Violation of Sections 812,841 (a)(1) and 841 (b)(1)(B).

After a jury trial, concluded on January 17, 1974, the defendant-appellant by jury verdict, was found guilty on Count I and not guilty on Count II of the indictment.

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That on March 1, 1974, the defendant-appellant, Deryl Wilson, was sentenced by Honorable Morris E. Lasker, United States District Judge, to the custody of the Attorney General for imprisonment for treatment and supervision, pursuant to 18 U.S.C., Section 5010 (b) until discharged by the Federal Youth Correctional Committee of the Board of Parole as provided in 18 U.S.C., Section 5017 (a).

That thereafter and on March 1, 1974, a notice of appeal was duly filed.

That the defendant-appellant, Deryl Wilson, was admitted to bail in the sum of \$5,000.00 personal recognizance, bail secured by \$500.00 cash pending the within appeal.

PRELIMINARY COMMENT

The defendant-appellant herein was attempting to perpetrate or assisting in perpetrating a larceny by fraud upon the undercover agent involved in the case herein and in the Court below. Appellant's position was that he never handled any heroin, received payment for the sale of heroin, or knew that any person or persons were going to sell or transfer heroin to the undercover agent, but believed himself to be carrying out a role in a previously conceived conspiracy to defraud a large-scale purchaser of narcotics (12a-21a).

Therefore, the defendant-appellant was not culpable of

nor privy to any conspiracy to sell narcotics which may have existed.

The issue of the defendant-appellant's actual or constructive unlawful possession of heroin with the intent to sell and/or actual sale of heroin was decided in the negative by the jury by reason of the defendant-appellant's acquittal on Count II of the indictment (51a, 52a).

Before this Court, there are several questions for the Court's determination.

The issue or questions of law upon which the within appeal is predicated are as follows:

QUESTIONS PRESENTED ON APPEAL

1. Whether or not the District Court erred in denying defendant's motion to dismiss the first count of the indictment by reason of the failure of the prosecution to make out a prima facie case.

2. Whether or not the jury's verdict of guilty on the first count of the indictment charging conspiracy was inconsistent and improper in view of their verdict of not guilty on the second and substantive count of the indictment.

3. Whether or not the District Court erred in denying defendant's motion to set aside the verdict of the jury as being contrary to the weight of evidence and inconsistent.

STATEMENT OF THE CASE

- A. ONLY TESTIMONY OF CONSPIRACY AND POSSESSION AND DISTRIBUTION RECEIVED FROM THE UNDERCOVER AGENT.

William Simpson, the undercover agent, offered the sole testimony connecting the defendant with conspiracy to distribute narcotics and was the only testimony that the defendant-appellant actually possessed and distributed narcotics.

- B. VERDICT OF ACQUITTAL WAS CONCLUSIVE ON THE ISSUE OF POSSESSION AND DISTRIBUTION OF NARCOTICS.

By the verdict of acquittal on the second count of the indictment, charging possession with the intent to distribute and/or distribution of a narcotic, the jury conclusively determined the question of the defendant-appellant having had possession, actual or constructive of a narcotic drug on May 21, 1973 and by that verdict conclusively resolved the question of whether or not the defendant-appellant knew that a narcotic drug was being sold or distributed to the undercover agent.

- C. DEFENDANT-APPELLANT BELIEVED HIMSELF IN A SCHEME TO DEFRAUD.

Deryl Wilson, the appellant, believed that he was taking a role in a conspiracy to defraud an underling of a criminal leader, and that the proceedings on May 21, 1973 were in furtherance of a previously established plan to swindle a prospective buyer of narcotics, by selling him flour or other non-narcotic substances in place of the narcotics for which he paid.

ARGUMENT

P O I N T I

DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR A DISMISSAL OF THE CONSPIRACY COUNT AT THE CLOSE OF THE GOVERNMENT'S CASE.

At the close of the Government's case, the appellant, through his counsel, moved for a dismissal of the first count of the indictment, charging conspiracy, by reason of the failure of the Government to make out a prima facie case of conspiracy (21a). The Court improperly denied that motion in spite of its expressed dissatisfaction with the proof(22a).

The essential elements of a conspiracy, and particularly the agreement to commit a crime, were singularly lacking in the Government case. As the Court said in UNITED STATES v. BORELLI, 336 F. 2d 376:

"The gravamen of the offense of conspiracy is the making of an agreement to commit a crime."

There was no proof offered by the Government of any agreement to commit a crime, and while it is conceded that:

"To constitute conspiracy to commit an offense against the United States, an agreement to commit an offense need not be in any particular form, or susceptible of direct proof, but may be inferred from other parties statements and acts with other circumstances." O'NEAL v. UNITED STATES, 240 F. 2d 700

There was no indication that the appellant Deryl Wilson ever

made or entered into any criminal agreement.

There was nothing presented in the Government case to connect the unknown men to whom the appellant spoke in Singleton's Bar with any conspiracy, or, in fact, with any unlawful act of any kind.

Special Agent Simpson testified (8a) that he never spoke to the unknown men or saw anything, particularly a package in their hands. He did not identify the person who he alleges received the money from appellant and gave the package containing the alleged narcotics to appellant, as one of the unknown men appellant spoke to in the bar.

The mere act of speaking to other persons, without more to connect these others with a conspiracy, must be insufficient to permit the inference of an unlawful agreement. In *ONG WAY JONG v. UNITED STATES*, 245 F. 2d 392, the Court said:

"Conspiracy is a partnership in criminal purpose and the gist of the crime is the conference or combination of minds, and to infer guilt from mere association between conspirators does not meet the necessary test."

While Special Agent Simpson testified on the Government case to a sale of narcotics to him by appellant, this act is insufficient to support a conspiracy without the showing of an unlawful agreement. A conspiracy cannot be committed

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by a single person acting alone; he must act in concert with another person. See: HERMAN v. UNITED STATES, 289 F. 2d 362; and assuming the jury believed, during the Government's case that the sale was consummated by the appellant, the overt act alone would be insufficient to constitute a conspiracy because there must be an unlawful agreement to which the overt act is referable. See: HALL v. UNITED STATES, 109 F. 2d. 976.

The only criminal agreement testified to in the Government case was the alleged agreement between Special Agent Simpson to buy, and appellant Deryl Wilson to sell, a quantity of narcotics. The record is absent any allegation that appellant said he would get the contraband from someone else. Any agreement between Special Agent Simpson and appellant would be insufficient to make out a conspiratorial agreement. In UNITED STATES v. ZEULI, 137 F. 2d 845 the Court said:

" If a crime necessarily involves mutual cooperation of two persons and they have in fact committed the crime, they may not be convicted of conspiracy to commit it." (See also CURTIS v. UNITED STATES, 67 F. 2d 943)

P O I N T I I

THE VERDICT OF THE JURY CONVICTING APPELLANT OF CONSPIRACY WAS INCONSISTENT WITH ITS VERDICT ACQUITTING HIM OF POSSESSION AND SALE OF NARCOTICS AND WAS LEGALLY INCORRECT.

The jury convicted appellant of conspiracy to possession and distribution of narcotics. The only testimony presented to the jury concerning a conspiracy to possession and distribution of narcotics was from Special Agent Simpson. No other proof of such a conspiracy was offered. By its verdict of acquittal, the jury demonstrated its disbelief of Special Agent Simpson's testimony and the Government case as a whole.

Appellant Deryl Wilson testified to a conspiracy, but a conspiracy to defraud, not to possession or distribution of narcotics (12a-21a).

Having rejected the allegations of the Government case on the charge of possession and distribution of narcotics, of which Special Agent Simpson's testimony was an integral part, the jury's verdict of guilty on conspiracy was improper and irrational where the only testimony of the conspiracy to violate the United States drug laws came from same, Special Agent Simpson.

P O I N T I I I

THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION TO SET ASIDE THE VERDICT OF THE JURY AS BEING CONTRARY TO THE WEIGHT OF EVIDENCE AND BEING INCONSISTENT.

While it's conceded that a mere inconsistency between

verdicts in an individual case may be harmless and a defendant may properly be found guilty of conspiracy to commit a crime against the United States, while at the same time he is found not guilty of the substantive crime, the cases in support of this premise have clearly indicated that the conspiracy conviction has been supported by proof other than that necessary to convict on the substantive charge. UNITED STATES v. KAHN, 366 F. 2d 259; UNITED STATES v. PALMIERI, 456 F. 2d 9.

The jury in the District Court by acquitting the appellant Deryl Wilson of the substantive charge of possessing and distributing narcotics necessarily found not proved that the Appellant Deryl Wilson committed the alleged act under the conspiracy count, of delivering a package to Special Agent Simpson. Assuming arguendo, that the jury believed that the Appellant Deryl Wilson entered into an agreement to distribute narcotics, with the two unknown men he met in Singleton's Bar on May 21, 1973, absent an overt act in furtherance of that agreement the jury could not properly find the Appellant guilty of conspiracy. The Court, in WOODRING v. UNITED STATES, 376 F. 2d 619 said:

"An "overt act" is some act done to effect the object of conspiracy and although the gist of a conspiracy is an agreement to effect an unlawful

end, some one or more of the parties to the conspiracy must have done some overt act before the offense is a completed one."

There was no testimony that either of the two unknown persons was the individual who gave Special Agent Simpson the package and received the money.

Mr. Justice Butler in his dissent in *DUNN v. UNITED STATES*, 284 at P. 406, said:

"I am of the opinion that the authorities establish as well settled... (2) that, when different crimes are charged in separate counts and the jury acquits as to one and convicts on the other, the conviction will be sustained unless, excluding the facts which the jury in reaching its verdict of acquittal necessarily find not proved, it must be held as a matter of law that there is not sufficient evidence to warrant the verdict of guilty; and where the evidence outside the facts so conclusively negated by the acquittal on one count is not sufficient to sustain guilty on the other count, the defendant is entitled to a new trial. "

The appellant Deryl Wilson testified that he did not possess or distribute narcotics, nor knowingly enter into a conspiracy to possess or distribute narcotics. He was the only witness for the defense. Special Agent Simpson testified

that the appellant Deryl Wilson did enter into a conspiracy to possess and distribute narcotics and that he, in fact, did possess and distribute narcotics and did receive a sum of money for such distribution. Special Agent Simpson was the only witness for the prosecution who testified the appellant Deryl Wilson conspired to possess and distribute narcotics. Once being rejected the testimony of Special Agent Simpson concerning the appellant's possession and distribution of narcotics on May 21, 1973, acceptance of Special Agent Simpson's testimony, equivocal as it was, concerning the appellant's participation in a conspiracy to possession and distribution of narcotics would be irrational.

The appellant Deryl Wilson testified to his intent being to participate in a conspiracy to defraud Special Agent Simpson who he believed to be an "underworld" purchaser of narcotics. Both the appellant Deryl Wilson (20a, 21a) and Special Agent Simpson (7a) testified to the appellant Deryl Wilson being present when the package allegedly containing narcotics was transferred on May 21, 1973. If the jury had believed that the appellant Deryl Wilson knew what was in the package, they would have had a right to convict him of the substantive count of possessing and distributing narcotics. However, they acquitted him on that charge, thus clearly indicating that they believed that he did not know what was

in the package transferred and tacitly accepting appellant Deryl Wilson's testimony (12a-21a) that he believed the substance being given to Special Agent Simpson to be flour.

In UNITED STATES v. GISEHALTZ 278 F. Supp. 434 the Court said:

"An individual defendant's connect with a conspiracy must be proven by his own acts, declarations and conduct."

And in STANLEY v. UNITED STATES, 245 F. 2d 427, it was said:

"One who has no knowledge of the object of a conspiracy cannot be a conspirator for the intent to participate is lacking."

If there was a conspiracy to distribute narcotics, the appellant Deryl Wilson had no knowledge that this was the object of the conspiracy.

CONCLUSION:

FOR THE REASONS ABOVE STATED THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

DONALD A. ALTMAN
Attorney for Defendant-Appellant
Deryl Wilson

APPENDIX

UNITED STATES COURT OF APPEALS
For the Second Circuit

.....

THE UNITED STATES,

vs.

DERYL WILSON

.....

RELEVANT DOCKET ENTRIES

Date	Proceedings
1/14/74	Filed indictment. (Superseding 73Cr874 and assigned to Lasker, J.)
1/16/74	Deft. (Atty Present) PLEADS NOT GUILTY.
1/16/74	Jury Trial begun before LASKER, J.
1/17/74	Trial cont'd and concluded, Jury Verdict - Deft. GUILTY on Ct. 1 and NOT GUILTY on ct. 2. Cont'd. on present bail. P.S.I. Ordered. Sentence date set for 3/1/74. LASKER, J.
3/1/74	Deft. (Atty Present) Filed Judgment and issued copies of commitment.

It Is Adjudged that the deft. is hereby committed to the custody of the Atty. Gen. of his authorized representative for imprisonment for treatment and supervision pursuant to 18 U.S.C. Sect. 5010(b) until discharged by the Federal Youth Correction Division of the Board of Parole as provided in 18 U.S.C. Sect. 5017(a). It Is recommended that

RELEVANT DOCKET ENTRIES

the deft. be held in custody at the Kennedy Youth Center, Morgantown, West Virginia, unless its medical facilities are inadequate to deal with the deft's physical disabilities, in which case it is recommended that he be held in custody at the Medical Center for Federal Prisoners, Springfield, Missouri. LASKER, J.

3/1/74 Filed deft's notice of appeal from the final judgment entered in this proceeding on March 1/74. m/n. Leave to appeal in forma pauperis is granted-Lasker, J.

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....
UNITED STATES OF AMERICA,

v.

DERYL WILSON,

Defendant.
.....

The Grand Jury charges that:

1. From on or about the 1st day of May, 1973 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Deryl Wilson the defendant and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

INDICTMENT

SECOND COUNT

On or about the 21st day of May, 1973, in the Southern District of New York, Deryl Wilson the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 65.1 grams of heroin hydrochloride (Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York.

(1) On or about May 21, 1973, the defendant DERYL WILSON had a conversation with William Simpson in Singleton's Bar and Grill, at 122nd and 8th Avenue, New York, New York;

(2) On or about May 21, 1973, the defendant DERYL WILSON had a conversation with two men in Singleton's Bar and Grill, at 122nd and 8th Avenue, New York, New York; and

(3) On or about May 21, 1973, the defendant DERYL WILSON delivered a package to William Simpson. (Title 21, United States Code, Section 846).

PAUL J. CURRAN,
United States Attorney.

.....
Foreman

EXCERPTS FROM TESTIMONY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Cr. 38

.....X

UNITED STATES OF AMERICA,

against

DERYL WILSON,

Defendant.

.....X

BEFORE:

HON. MORRIS E. LASKER, D.J.,

and a Jury.

New York, January 16, 1974,
10:00 a.m.

APPEARANCES:

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York

BY: DAVID CUTNER, ESQ.

FRANK WOHL, ESQ.,

Assistant United States Attorneys,
of Counsel

DONALD A. ALTMAN, ESQ.
Attorney for defendant.

* * *

(25) WILLIAM SIMPSON, called as a witness on behalf of
the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Cutner:

* * *

WILLIAM SIMPSON..FOR GOVERNMENT..DIRECT

By Mr. Cutner:

(34) Q. Did there come a time when your package, that is, the heroin you were going to buy, arrived at the bar?

A. Yes, sir.

Q. When was that? A. Well, it was approximately 6 p.m.

Two male individuals walked into the bar and at that time Shorty and me, we greeted them, and they went in a conversation for a brief minute or so.

Then Shorty, the defendant Deryl Wilson, he came over to me and he asked me for \$4500. And I asked him for the one eighth kilogram of heroin. And he said "I just want to count the money and make sure everything is okay."

So myself and Defendant Wilson and the informant Sam, the three of us walked outside to my car, and we opened up the trunk.

THE COURT: You and Sam and who walked outside.

THE WITNESS: Defendant Deryl Wilson; we walked outside. And we opened up the trunk of my car where the money was hidden, and that was also a pre-arranged signal for the surveillance agents to know that the purchase was about to go down.

And once I got the \$4500, the three of us walked back into the bar and myself and Defendant Deryl Wilson, the two

WILLIAM SIMPSON..FOR GOVERNMENT..DIRECT

of us, we walked into the men's room and that is (35) where I counted out the \$4500. But I still kept the \$4500 in my possession.

Q. You counted out to the defendant and he watched you?

A. Yes.

Q. Then what happened? A. Then we exited the men's room and the three of us, myself, the defendant and the informant Sam, and the two male individuals, the five of us, just about the same time, we exited the bar and right next to the bar, adjacent to the bar, is an apartment building and we all walked inside the apartment building.

THE COURT: You mean you don't have to go outside, you can go directly from the bar into the apartment building?

THE WITNESS: No, sir, we walked outside on the street, and right adjacent to the bar, there was an apartment building and we walked inside in the hallway of the apartment building.

The two male individuals already walked upstairs and the defendant Wilson told myself and the defendant Sam-- I mean, the informant Sam, to wait in the corridor and I would say, approximately, maybe five--maybe five minutes to be exact, one of the male individuals, he walked back down-- (36) stairs and walked directly out of the building.

About two minutes later, the defendant came downstairs and he asked me for the \$4500.

* * *

WILLIAM SIMPSON..FOR GOVERNMENT..CROSS

(73) By Mr. Altman:

Q. Was it your testimony that it was after you brought the \$4500 from the trunk of your car that these two unknown individuals came into Singleton's and approached the defendant? I don't recall. A. No, sir, it was before.

Q. Where did these two unknown individuals speak to Mr. Wilson when they came in? A. Inside the bar. It was away from me. I couldn't hear what they were saying.

Q. In other words, the defendant was sitting next to you? A. Yes.

Q. And when they came in A. He got up.

Q. He got up and walked over to them, is that right? A. Yes, sir.

Q. And they had this package in their hands, didn't they, one of them? A. I don't know what they had in their hands, sir.

Q. Did you see anything in their hands? A. No, sir.

Q. Mr. Simpson, did they leave the bar first or did you? (74) A. They left the bar first.

Q. And then you went out and got your money, is that right? A. No, sir, I--I got my money--let's see, they came in to the bar and Mr. Wilson went over to the two individuals and he came back to me and he asked me for \$4500. That is when both of us went out to the car and they probably was

ROBERT GRANT..FOR GOVERNMENT..DIRECT

still inside the bar.

Q. Oh, you came back in to the bar. Were they there?

A. I don't know. My--more than likely they were there.

Q. Mr. Simpson, you believe yourself to be involved in a fairly heavy narcotics transaction, didn't you? A. Yes, sir.

Q. And at the time you believed these two men had something to do with that narcotics transaction, didn't you?

A. Yes, sir.

Q. And yet you are telling us that when you returned to the bar you don't recall whether you saw them or not, is that right? A. No, sir.

Q. Did you look for them? A. No, sir.

Q. You weren't concerned; is that right? (75) A. No, sir.

* * *

(103) ROBERT GRANT, called as a witness on behalf of the Government, having been first duly sworn by the Clerk of the Court, testified as follows:

Direct examination by Mr. Cutner:

* * *

By Mr. Cutner:

(119) Q. What happened after he opened the trunk? A. He went back into the bar.

Q. What happened next? A. Sometime later, Agent Simpson, the informant, and Mr. Wilson, come out and stood in front of the doorway adjacent to the bar.

THE COURT: Move along. You know, we just want to know

ROBERT GRANT..FOR GOVERNMENT..CROSS

what happened. Just keep telling us what happened.

THE WITNESS: That is as far as I got.

THE COURT: You mean you left the scene then?

THE WITNESS: No, sir.

THE COURT: What did you do next?

THE WITNESS: I stayed in surveillance. Agent (120) Simpson stood in front of the bar.

THE COURT: Yes?

THE WITNESS: And periodically, Mr. Wilson seemed to go in and out of the doorway.

Q. What happened after that, if anything? A. And Agent Simpson, Mr. Wilson and the informant went to the car. They got in the car. They remained there a short time and Mr. Wilson exited the car and went back into the bar and Agent Simpson and the informant drove away.

* * *

(149) Cross Examination by Mr. Altman:

Q. There came a time, if I recall your testimony yesterday, when two unknown males exited Singleton's Bar, followed shortly thereafter by Agent Simpson, the defendant and the informant Sam, is that correct? Was this your observation? A. I don't believe I stated anything about seeing two males proceed outside the bar.

* * *

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ROBERT GRANT..FOR GOVERNMENT..CROSS

(152) THE COURT: Agent, I want to ask you a question.

(153) When you came in here you were asked earlier in your testimony whether you knew Deryl Wilson, and you said you did.

THE WITNESS: Yes, sir.

THE COURT: And you identified him?

THE WITNESS: Yes, sir.

THE COURT: When, before yesterday, did you see his face?

THE WITNESS: The day after his arrest was the first time.

THE COURT: You didn't see his face on May 21st?

THE WITNESS: No, sir.

THE COURT: You cannot identify him as the person you saw on May 21st, is that right?

THE COURT:(sic) That's correct.

MR. ALTMAN: Your Honor, at this time, I move all the witness' testimony concerning the identification and observation of the defendant, be stricken.

THE COURT: Do you have to say anything to that?

MR. CUTNER: Yes, your Honor.

THE COURT: Ladies and gentlemen, would you mind leaving?

* * *

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HAG CONTENT

DERYL WILSON..DEFENDANT..CROSS

(210) DERYL WILSON, called as a witness in his of behalf, having been duly sworn by the Clerk of the Court, testified as follows:

Cross Examination by Mr. Cutner:

* * *

By Mr. Cutner:

(241)Q. This time that you played pool with Sam, did you talk about junk, heroin, narcotics? A. No, not really, because I didn't know anything about it.

Q. Not really, or no? A. No.

Q. Well, did you see him again after the time you played pool? A. Yes, I seen him many times there.

Q. Did you ever have a conversation with him about narcotics? A. No, he had a conversation about beating some people out of some money.

Q. Who was he going to beat out of some money? A. He didn't call any names. He only said some people from Washington.

Q. How did he propose that these people be beat out of some money? (242) A. He had said that he had knew some people in Washington that he used to work with, that the man was a Lieutenant, he was a man lieutenant and he was trying to cut the dope before he could move in to his spot. He said that if the dude go back to Washington with no money,

DERYL WILSON..DEFENDANT..CROSS

that the dud was going to--

Q. How many dudes were there? A. Well, together around and about, there were three of them.

Q. There were three men, three dudes coming up from Washington? A. Three didn't come from Washington. One. But two--finally I discussed that with many people around there, but didn't believe it because the only thing they talked about trying to do was make a conversation and maybe--maybe talk about some money, so they could get some stuff. That was my opinion.

Q. Well, was it your impression that Sam was telling you that some guys were coming up from Washington to buy some narcotics and they had a lot of money? A. I didn't believe him.

Q. Was that what he told you? A. What?

Q. Did he tell you that? (243) A. No, he didn't tell me what they was coming up here for then. He told me he was going to beat them.

Q. He just said there was somebody coming from Washington with a lot of money? A. He didn't discuss the whole details with me.

Q. When was this conversation, do you recall that? A. Oh, this was a long time before then. He had been coming around--

Q. A long time before May of 1973? A. I would say he--he start coming around regular in, I would say, just a little

DERYL WILSON..DEFENDANT..CROSS

after February; maybe in April, something like that.

Q. Sam was coming around Singleton's on a regular basis?

A. Right.

Q. Since April? A. Right.

Q. Well, when was this conversation? Was that sometime in April then? A. I would say we conversated in March, and then when he conversated with me he started coming around regular. Instead of going around his regular, he started coming back there.

Q. Was anybody else there, or was he talking to you (244) and some other people, or just talking to you? A. He was talking to various people.

Q. When he talked to you, was there anybody else there? A. The place was crowded.

Q. No, was anybody engaged in a particular conversation that he was having? A. No.

Q. He came back and he raised this subject again with you? A. Right.

Q. And what did you tell him? A. Then when he raised the subject about three or four times, you know, I say, "Man, this is serious, you know."

So he had told me then what he was going to do.

Q. What did he tell you he was going to do? A. He told me then he was going to rob the dudes.

Q. How was he going to rob them? A. He told me he was going to give them some flours to sell.

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Q. You knew at that time these guys were coming up to buy some stuff, right? A. I knew they was coming up to buy some flours.

(245) Q. What was Sam asking you to do? A. Well, at that particular time, I think Sam just wanted me to do that, but I was--

THE COURT: He wanted you to do what?

THE WITNESS: To me, like I had the stuff and get it.

THE COURT: In other words, you would be the one to hand over the flours instead of stuff?

THE WITNESS: Right, but I wasn't going to be a fool. Because I figured like this, I didn't know the dudes, or anything like that. Anybody should know stuff from that if they had been involved in it, if he's a lieutenant, so I didn't want to get kilos(sic) or nothing, because I had seen fellows get kilos(sic).

Q. Did Sam tell you this dude coming up from Washington was a lieutenant? Is that what he said? A. Right, a lieutenant. I explained that to you earlier.

Q. He was going to beat the lieutenant out of the money? A. No, he was going to beat the lieutenant out of the man money. Let me explain it to you more clearly from what I have learned since that time.

(246) A Lieutenant is a dude that goes out and distributes

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stuff out for whoever he is working for.

THE COURT: You mean the lieutenant dealing with stuff, you don't mean a lieutenant in the army, something like that?

THE WITNESS: No.

THE COURT: You are just using a word--

THE WITNESS: That is what they use.

Q. I see. So that this was not some kind of law officer or anybody like that? A. No.

Q. It was just a guy selling narcotics. A. That's right, that's what I thought.

Q. Or buying narcotics? A. Right.

Q. So you knew that this dude was coming up from Washington to buy narcotics? A. Well--

Q. That was the plan, right? A. Well, that was Sam's plan. I knew he was supposed to get some flours, I wanted to give to him.

Q. But you had a little plan, so Sam proposed there was a plan to deceive this guy, instead of giving him narcotics you were going to give him flours? (247) A. Explain that again. I don't understand.

Q. There was a plan Sam told you about where this guy would come up from Washington in order to buy some heroin, but instead it was proposed that you give him a bag of flour instead of the heroin, is that right? A. Yes.

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Q. What did you say when Sam proposed this plan to you?

A. Like I told you just now, I thought he was crazy, I wasn't going to get killed over nothing.

Q. So did Sam talk to you again? A. Yes, he talked to me.

Q. What happened the next time that he talked to you about it? A. He talked to me again and asked me would I do it. I told him no.

THE COURT: The same plan?

THE WITNESS: Right. Then he came back and said, "Look, I know these dudes, you probably"--he asked me--

THE COURT: A little louder, please.

THE WITNESS: He asked me first did I know of any of them. He say, "I know some dudes, I imagine I can get them," you know, like I had dropped the whole idea from my mind because I figured somebody was going to get hurt.

(248) Q. Sam told you he knew some dudes he could get what from? A. Dope. That is what we talked about.

Q. So at this particular meeting, there was a change in the plan. Now you were actually going to sell them some narcotics? A. I wasn't going to sell them something I don't have.

MR. ALTMAN: Objection. That is not the testimony.

THE COURT: He's asking him what the plan was.

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When Sam said he knew some dudes that he thought he might be able to get some dope from, when he said that, what did he suggest doing?

THE WITNESS: Well, he suggest that he was going to go make preparations to get that.

Q. Get what?

THE WITNESS: The dope?

THE WITNESS: No, make preparations to get, you know, get the stuff, the dope, the dope.

THE COURT: Then what would he do with it?

THE WITNESS: Well, what he wanted me to do--

THE COURT: What did he want you to do?

THE WITNESS: He wanted me to give it to him.

THE COURT: Give him the stuff? A. Yes, but I wasn't going along with that.

(249) Q. Sam wanted you to give the narcotics to the so-called lieutenant? A. Right, but I was not going along with that. Then he made another suggestion, suppose these people got the money, because the other people wouldn't know about it, but they would talk to him. Well, then, he wanted me, when Sam got it, he wanted me to give it to the man that was coming from Washington, but I wasn't going along with that, because I have seen dudes get busted in there and everything, we have a lot of sniffers about there.

Q. So at some point in your conversations with Sam the plan changed from selling some flour to selling some

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narcotics, is that right? A. Right.

Q. And didn't you tell us that you were going to make a lot of money? A. I was going to make lots of money.

Q. Were you told you were going to make lots of money? A. He had told me if I give the dude the flour we was to get some money.

Q. He told you sometime back in-- A. Well, you know--

Q. Back in April that you were going to make a lot (250) of money? A. He had told me when we were talking about the flour, right, that if we pulled this off we had \$4500 to split. But I wasn't going along with that.

Q. Well, what about if you sold some narcotics, were you going to make any money on that deal? A. I guess--I guess if we had sold some narcotics, probably would have cost that.

Q. Well, did you attempt to put up any money to do that? A. Me, how could I put up--

THE COURT: Don't you have any money?

THE WITNESS: Man, I haven't seen a hundred dollars in so long I thought they stopped giving it out. \$4500? If I had \$4500 I would be in Florida for a while. But the idea sounds good now, but it wouldn't have do me no good, I probably would have been dead. If I took the flour they probably would have buried me.

Q. The idea didn't sound good when it was flour. Did it sound good when it was narcotics? A. No, it didn't,

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because I wouldn't have made that much money.

Q. What did you tell Sam when he told you the plan had changed, instead of using flour they were going to sell (251) these guys narcotics? A. Instead of going through the whole procedure, we had dropped the whole subject and the whole idea.

Q. This plan was just abandoned? A. Right, until Sam came back and then he told me, "I got the people."

* * *

(262) THE COURT: Do I understand you correctly, Mr. Wilson, that you thought that the agent or the dude, or whatever you want to call him, that he expected to get some junk?

THE WITNESS: Yes.

THE COURT: But you didn't think he was going to get it?

THE WITNESS: Right.

THE COURT: You thought he was either going to get flour or get robbed, you said?

THE WITNESS: Right.

* * *

(278) Q. Isn't it your testimony, Mr. Wilson, that the reason why you weren't afraid you were going to get killed on May 21st was because you knew that there was heroin in that package, right? A. When I was in the car and Sam took a blow I could see there was no heroin, because I never seen it before.

DEFENDANT'S MOTION TO DISMISS

Q. You weren't afraid to go and watch him count out the money and you weren't afraid to go in the hallway and watch this package change hands and you weren't afraid to walk out to the car that day? A. I wasn't afraid for the simple reason I was not going to handle the merchandise, because for the simple reason if he--if that is what he had, the only person he will look for is that junkie who hand him the merchandise. He (279) don't have no reason to look at me. If I were to hand him the package, he would have more reason. He could have killed me right there and I couldn't have said a word.

* * *

(207) THE COURT: I take it you rest now?

MR. CUTNER: Yes.

THE COURT: Make your motion now.

MR. ALTMAN: For the record, at this time I would respectfully move to dismiss both counts of the instant indictment on the grounds that the United States Government has failed to make out a prima facie case of--and I will take this one at a time--conspiracy first. There is no evidence offered of any kind of conspiracy. The sole conversation which had been testified to were with Agent Simpson--assuming everything was believed--the sole conversations were with Agent Simpson.

HAS CONTENT

DEFENDANT'S MOTION TO DISMISS

There is no showing here of any kind of conspiracy.

THE COURT: I take it the Government's theory is not that the defendant was conspiring with Simpson, but (208) the defendant was conspiring with the unknown men.

MR. CUTNER: Yes, your Honor.

THE COURT: And on that basis, while I am not happy about the conspiracy count myself, I believe that there is enough evidence here to send to the jury. Clearly the defendant, if they believe the evidence--and I believe Simpson's testimony--clearly then one could find beyond a reasonable doubt, and a reasonable man could so find, that the defendant had a deal worked out with some others to supply him with this stuff and they, in fact, supplied him with this stuff, too.

And on that ground your motion as to count 1, is denied.

* * *

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CHARGE OF THE COURT

(318) (LASKER, J.)

The Court: Ladies and gentlemen, this has not been a very long trial, fortunately for all of us concerned, and the addresses which you just heard from counsel have not been too long, it seems to me, for me to be able to go ahead and charge you at this time. On the other hand, I mean to have your absolute attention, and if you feel tired as a result of having listened to those addresses, and would like to take a few minutes before I do charge you, I will do so.

Nobody is raising his hand or her hand, so I hope we can go ahead.

Ladies and gentlemen, I would much prefer if it were possible in today's world, merely to charge you informally the way I am talking now, to tell you what the law is, but the law has become somewhat complicated and the issue of whether a man is to be found guilty or not guilty, is terribly important and nobody wants to make a mistake.

So it is the custom in this court to reduce instructions of the Court to writing. I tell you that first of all so you will understand why I will be reading you the charge, and secondly, so that should I read too quickly, or if for any reason you are not able to keep up with me, or to understand what I am saying, I want you to let me know, (319) because after all, it is terribly important for you to know precisely

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what rules apply in making a decision in this case.

With that introduction, let me proceed to give you my charge.

Ladies and gentlemen, now that you have heard the testimony and the arguments of counsel, the time has come to instruct you as to the law governing the case. You have been chosen and sworn as jurors in this matter, to try the issues presented by the allegations of the indictment and on your determination of the facts, to decide under the law, as I shall instruct you, whether Mr. Wilson is or is not guilty of the charges which have been brought against him in this indictment.

I will discuss those charges with you in a moment in detail, but first, I want to say that you are to perform your duties as jurors without bias or prejudice to or for anybody, whether the Government or Mr. Wilson. The law does not permit jurors--and you wouldn't want it to permit jurors--to be governed either by sympathy or prejudice or public opinion. And in that regard, let me state that we are dealing, as I mentioned yesterday, with a subject in this case which has emotional overtones and towards which public opinion is unanimous, and so is defense counsel, who addresses you and presumably everybody in this room. The (320) question before you is not whether your or I or anybody

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else likes narcotics. The question before you is whether Mr. Wilson committed the act which the Government contends that he committed or not. It is an objective determination that you are to make based, of course, on your estimate of what you believe from the witnesses.

Does everybody understand that?

It would be unfair for you to declare a man guilty just because, for example, you may feel strongly about a certain subject, if the proof is not there. In fact, it would be a violation of your oath. It would be equally unjust, of course, for you to acquit a defendant if you were sympathetic to him for one reason or another, if the evidence is there.

The defendant and the Government each have a right to expect that you will carefully and impartially consider the evidence, follow the law as stated by me, and reach a just verdict, whether for the Government or for Mr. Wilson, regardless of the consequences.

Now, although you are the jurors and therefore are the judges and the sole judges of the facts in this case, you are bound to follow the law as stated in these instructions, and to apply the law as I state, to whatever facts you find.

(321) During the course of their summations the attorneys may have referred to the law. When they did, as I recall, they referred to it accurately. But their references are not binding on you. My statement of the law is what is

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binding.

Now, we start, ladies and gentlemen, with the proposition that we started with at the outset of the trial; that is, that the law presumes every defendant and Mr. Wilson, of course, to be innocent of the charges against him.

You will recall that when you were selected, I specifically asked each one of you if you could enter into the discharge of your duties presuming Mr. Wilson to be innocent unless proven guilty beyond a reasonable doubt by your own deliberations, and each of you gave me the answer yes, that you could.

This presumption of innocence is sufficient to acquit the defendant, unless or until you, as jurors, have unanimously satisfied yourselves beyond a reasonable doubt of Mr. Wilson's guilt from all the evidence which has been presented. The burden is on the Government to prove Mr. Wilson guilty beyond a reasonable doubt of every essential element of each crime charged. And I will advise you in a few moments just what elements each crime charged includes.

(322) I also want to remind you of what I mentioned at the outset of the trial. That is, that the existence of the indictment, which I will later refer to, does not constitute evidence against Mr. Wilson, but is merely a method of bringing the charge against him here.

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Now, I have said several times that the Government must prove Mr. Wilson guilty beyond a reasonable doubt if you are to convict him.

Let me define that important term, that is, "reasonable doubt." A reasonable doubt is not a vague, speculative or imaginative doubt. It is a doubt which, as the phrase suggests, is based on reason which comes either from the evidence that you heard, or the lack of evidence.

It is a doubt that a reasonable man or woman might have entertained. It is a doubt, and I think this is the best definition of it, which would cause reasonable and prudent men and women, like yourselves, to hesitate in relation to matters of importance in your own private lives.

Let me say that you have an important decision to make. How do you go about making that decision? You think about everything that you know and you think about everything that you would want to know that you haven't been (323) told about and you say to yourselves "Do I have enough information; do I have enough information so that I am ready to act?"

If you say "I don't," then you have a doubt, a reasonable doubt.

If you say "I do," then you are prepared to make a decision.

A mere suspicion will not justify a conviction. Suspicion is not a substitute for evidence. Nor is it

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sufficient to convict anyone if you find that the circumstances merely rendered the guilt of that accused probable. We do not deal in probabilities. We deal only in decisions beyond reasonable doubt, or lack of such decision.

Since the burden is on the prosecution to prove the accused guilty beyond a reasonable doubt, a defendant has the right to rely upon the failure of the prosecution to do so. A defendant may also, of course, rely upon evidence brought out on cross examination of Government witnesses, of his own witnesses, if he has any, or on his own testimony.

Now, in saying that the Government must prove its case beyond a reasonable doubt, if there is to be a conviction, I do not mean to say that the Government is required to prove guilt beyond all possible doubt. In human affairs it is hard to think of anything that we can prove (324) beyond all possible doubt, with the possible exception of mathematical propositions.

But, the proof must be of such convincing character that you would be willing to rely and act upon it in the most important decision in your own affairs.

The evidence in this case, as I have told you in the past, consists of the testimony of the witnesses, the exhibits which have been received in evidence, and the facts which have been stipulated.

You have to decide this case based solely on the

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evidence, but in your consideration of the evidence, you are not limited to the bald statements of the witnesses here. On the contrary, you are permitted and required to draw from the facts which you find have been proved, such reasonable inferences as you find justified in the light of your own experience.

Now, ladies and gentlemen, I come to a very important subject, particularly important in this case. In deciding the many questions before you, it is your job to determine the credibility, or believability, of the witnesses who have testified before you in this case. And by stressing the importance of that subject, I do not mean to state what my own view is of the credibility of the witnesses, but merely to point out the obviously important part that that (325) determination plays in deciding this case.

You are to determine who to believe, who is telling the truth.

How do you go about that? Perhaps the best answer is to say that you determine the truthfulness of a witness in court in the same way that you would determine such a question in your own personal lives. We are all constantly called upon from day to day, to determine how much confidence we place in the statements that people make to us.

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The truthfulness of a witness, as that of any other person, can be determined by his demeanor, that is, his looks, his relationship to the case, to the parties, the possibility of his being biased or partial, or his not being biased or partial, the stake he might have in the case, the reasonableness or unreasonableness of his statements, the weakness of his statements and whether his statement is either contradicted by or corroborated by the statements of other witnesses.

In ordinary affairs in life when you need to test the truthfulness of persons, you asked yourselves, how did he impress me; did his statement seem straightforward and candid or did he seem to be trying to hide some of the facts? Did he have any motive to testify falsely or no motive of that kind?

(326) The ultimate question for you to decide in passing on the credibility of any witness is did he tell the truth before me. It is for you to determine the extent to which you believe any witness in any trial, or in this trial, whether it's been in whole, or in part, or not at all.

If you find, and I am not suggesting what you should do, that any witness has wilfully testified falsely as to any material, that is, significant matter, not some matter which you believe to be inimportant, you may reject the entire testimony of the witness, or you may accept such

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portion of it as you believe and reject the remainder.

You should take into consideration the interest which any witness may have in the outcome of the case.

The defendant, for example, and any defendant in a criminal case, is a person with a significant interest in the outcome of the case, since his personal future depends on it.

On the other hand, a Government agent may also be interested in the outcome of the case. That is for you to determine.

There are certain things I want to say that relate to this case in particular. In judging Mr. Wilson's testimony, I think it only fair to him to remember that he (327) comes from a different culture than most of you or all of you who are sitting in the jury, and that his testimony, like that of any witness, should be judged in the terms of his own background in determining whether or not he is telling the truth.

There has been testimony also with respect to the use of an informant, the famous Sam. These services, that is, the services of an informant, are used by Government agents at times to obtain introductions to persons who are suspected of violating the law. There are certain types of crime--and certainly the field of narcotics is one of them--where without the use of informants, detection would be extremely difficult. Frequently it is necessary for the Government to

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use informants in order to get leads to introductions to persons allegedly engaged in illegal activities or otherwise, to aid enforcement officers.

Also with regard to Sam, let me give you the following instructions: The law does not require the prosecution to call as witnesses, all persons who may have been present at any time, or place, involved in the case, or all persons who may have knowledge of the matters in issue at the trial.

However, in judging the credibility of the witnesses who have testified and in considering the weight (328) and effect of all the evidence that has been produced, you may consider the prosecution's failure to call other witnesses such as Sam, or to produce other evidence shown by the evidence in the case, to be in existence and available and within control of the Government.

As I mentioned to you earlier, ladies and gentlemen, your determination in this case must be based on the evidence. There are generally speaking, two types of evidence from which you may properly find the facts of the case. You probably heard them referred to fairly often. One is called direct evidence; that is, the evidence of an eyewitness, or somebody who hears what he reports.

The other is indirect, or circumstantial evidence. That is the proof of a chain of events or circumstances which point to the existence, or non-existence of certain facts as

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to which there was no eyewitness or ear witness.

The law makes no distinction as to the importance or weight of circumstantial or direct evidence just because it is either direct or circumstantial. It requires only that you, the jury, find the facts in accordance with all the evidence in the case, both direct and circumstantial, beyond a reasonable doubt.

An example, by the way, of the differences between direct and circumstantial evidence would be the following (329) and it is an example which is given to juries quite often, but which I think is a good one--if you look out the window--not in this courtroom, because we don't have a window, but if there were windows and you saw that it was raining, that would be direct evidence that it was raining.

On the other hand, if a man walked in through that door and you had not looked out the window to see that it was raining, and he has an umbrella that was dripping, that would be pretty good circumstantial evidence that it was raining outside. You wouldn't be seeing this with your own eyes, but you would have the right to infer, seeing a man coming through the door with a dripping umbrella, that it was raining outside. To be sure, he might have been standing in the shower in one of the rooms of this building that has a shower, but that is highly unlikely and the other inference is a likely one.

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Now, to go to another subject, ladies and gentlemen. Both the United States and defense counsel have, from time to time, although very rarely I might say, objected in this case to the introduction of evidence and addressed arguments to the bench. It is the duty of attorneys on each side of the case to make such objections when an attorney believes that the other side is proposing to put into evidence, or ask questions, something that is not properly (330)admissible. I want you to know that when I have sustained an objection, or when I have overruled an objection to a question, that doesn't indicate in any way any attitude of mind about how this case ought to be decided. The only thing it means is when I have sustained an objection, you are to disregard the question and not figure out from the wording of the question what the witness might have answered if he had been allowed to do so.

Now, ladies and gentlemen, that I have instructed you as to the manner in which you consider the evidence--and you heard a summary of that evidence from defense counsel and the United States Attorney--I will turn to the substance of the charges against Mr. Wilson.

The indictment charges Mr. Wilson with a violation of the so-called Federal Narcotics Laws which deal with so-called controlled substances. The term "controlled substances"

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is used in the Act which is in question here. Among other things, that Act makes it unlawful for any person, knowingly or intentionally, to distribute or to possess with intent to distribute, any controlled substance such as heroin.

And, in addition, any person who conspires to commit any such offense commits a separate crime.

The first count of the indictment charges conspiracy; (331) that is, it charges Mr. Wilson, together with unknown persons, with conspiring to violate the narcotics laws.

The second count is the so-called substantive count; that is, it charges Mr. Wilson with actual violation of the Federal Narcotic Laws, not just conspiring to do so.

Since a conspiracy to commit a crime is an entirely separate and distinct offense from the substantive crime, I will describe that too separately.

The essence of the crime of conspiracy is an agreement, or understanding, to commit an illegal act. Just bear that in mind, ladies and gentlemen. I am going to give you more detail about conspiracy, but I find sometimes details confuse the jury and I think if you do get confused all you need to do is come back and remind yourselves that the essence of conspiracy is an agreement among two people to violate the law.

In order to prove the conspiracy charged against Mr. Wilson, the Government must prove each--and that means all--

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of the following three elements, beyond a reasonable doubt.

First, that a conspiracy existed, as charged in the indictment. That is in plain language, that an agreement existed between Mr. Wilson and somebody else, to violate the provisions of law which prohibit the distribution of (332) heroin.

Second, that Mr. Wilson knowingly and wilfully joined that conspiracy; and

Third, that at least one of the conspirators, Mr. Wilson or somebody else that you find to be a conspirator with him, committed one of the so-called overt acts specified in the indictment. And I will read those to you later.

Let's talk about what a conspiracy is. Frankly, in my opinion, every juror that comes into this courthouse knows, without Court instructions, what a conspiracy is, but we do want to make sure there is no mistake about it.

I have already told you that the simplest way to put it is to say--and this is accurate--that it is an agreement by two or more people to violate the law or to commit a crime.

It is sufficient in law if two or more people, in any manner through any method, come to a mutual agreement to accomplish a common, unlawful purpose. They do not have to specify to each other, they do not have to say to each other "Let us do this and that", they do not have to write it down.

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If you are persuaded that Mr. Wilson and another person had a mutual intent to commit the crime of distributing heroin or possessing it for distribution, then the conspiracy (333) charged in this--you may find the conspiracy charged in this indictment existed.

Now, the period of time charged in this indictment is from on or about the 21st of May 1973, to some date in September, 1973. It isn't necessary for the Government to prove that the conspiracy started and ended on those specific dates. It is sufficient if you find, in fact, the conspiracy was formed that existed for a substantial period during the period set forth in the indictment.

I have talked to you about the first element of the conspiracy count that you must find, that is, that the conspiracy actually existed.

Now, we come to the second count. If you are satisfied beyond a reasonable doubt that the Government did prove the conspiracy existed, then you must determine whether Mr. Wilson knowingly and wilfully joined that conspiracy. When I say "joined the conspiracy", I don't mean he had to file an application of membership or anything formal of that kind, of course. Before, however, one can be found to be a conspirator, he must knowingly join the venture, he must promote it, or have a stake in the outcome. It would obviously be the height of injustice to find that somebody

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was a member of a conspiracy unless he knew what he was doing and he wanted to do it.

(334) So you must find that he knew what it was all about and that he wanted to be in on it and that he was, in the vernacular, in on the plan.

The key, of course, to this element of the crime is Mr. Wilson's knowledge or intent. In order to find this element of the crime against him, you must find that he knew what the plan was and that he intended to further it.

In determining the intent of a defendant, it is obviously impossible to look into his mind, that is, physically. Indeed, in determining anybody's intent, whether it is a member of your family or a friend or anybody you deal with, you can't do that. However, intent and knowledge may be inferred from a person's conduct and from a defendant's conduct, from his acts, from his statements and all the surrounding circumstances.

In determining Mr. Wilson's intent, you should consider such evidence as you recall and believe, as to the manner in which he behaved in relation to the subject matter of the indictment.

We come now to the final element which the Government must prove beyond a reasonable doubt with regard to conspiracy if you are to convict on the conspiracy charge, and that is, whether the Government has shown that at least one of the

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so-called overt acts was performed during the (335) period set forth in the indictment.

I will read you those overt acts. There are only three of them. And you must find one of those things occurred if you are to find that Mr. Wilson is guilty under count 1.

They are as follows:

"1. That on or about May 21st, 1973, Mr. Wilson had a conversation with William Simpson in Singleton's Bar and Grill at 122nd Street and 8th Avenue.

"2. On or about May 21st, 1973, Mr. Wilson had a conversation with two men in Singleton's Bar and Grill at 122nd and 8th Avenue."

And, finally, that "on or about May 21st, 1973, the defendant Derly Wilson, delivered a package to William Simpson."

Ladies and gentlemen, let me just tell you in my own words why it is necessary to find that one of those overt acts was committed by one of the conspirators. The reason is that the law does not find people guilty for merely thinking about doing something or planning to do something. You can only find the defendant guilty if you find that in a conspiracy, one of them actually took a step forward and did something in pursuance of the plan. And that is the reason why before you can find the defendant guilty, you must

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(336) find that either Mr. Wilson, or if you find that unknown persons conspired with him, that one of those unknown persons actually took an overt act. In this case the three overt acts specified here are specified to have been taken by Mr. Wilson himself.

You need not find that all of the overt acts were committed, but you must find that one of them was committed.

Ladies and gentlemen, I come to the elements of the offense charged in count two, the so called substantive charge.

Mr. Wilson may be found guilty on count 2 if, but only if you find beyond a reasonable doubt, that the Government has proved the following three elements as to count 2.

First, that on or about the date in question, May 21st, 1973, Mr. Wilson either distributed or possessed with intent to distribute, the narcotic drug controlled substance.

Second, that he did so unlawfully, wilfully and knowingly.

Third, that the substance, which was distributed, was in fact a narcotic drug controlled substance.

Let us go to the first element, that is, the (337) phrase "to distribute or possess with intent to distribute." The word "distribute" means either actual or constructively, or an attempt to transfer a drug.

The word "pcssess" of course, has its common everyday

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meaning, that is, to have something within your control.

Possession may be of two types, however. I use the words "actual or constructive" a moment ago. This is the more appropriate place for me to do so. It may sound like fancy or legal talk but when I explain it to you, I don't think you will find that it is. "Actual" means that the person has manual or physical control of the drug.

"Constructive possession" means that although the drugs or whatever is in question, is not in the physical possession of the person, that person nevertheless has the power to exercise control over them or over their distribution, or to direct their delivery.

In other words, to possess something you don't have to have it in your hand or in your pocketbook. If it is within your power to exercise control of the drugs, then in law, you possess them as much as if you actually had them in your own hands.

I do understand the Government to contend, however, in this case they have proven Mr. Wilson actually (338) did have the drugs in his control at least for a certain time, because the Government contends Mr. Simpson's testimony shows Mr. Wilson actually delivered the drug. Of course, Mr. Wilson states that he did not. And that is one of the questions you will have to decide.

Finally the word "intent", that is in the phrase "with intent to distribute", refers of course, to a person's state

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of mind.

So the term "possession with intent to distribute" means to control an item with the purpose of transferring it.

As to the second element, that is, unlawfully, wilfully and knowingly transfer", those words mean that you must be satisfied beyond a reasonable doubt that Mr. Wilson again knew what he was doing and that he did it deliverately and voluntarily as opposed to mistakenly or accidentally or as a result of some coercion.

And in this case, this element is important, because Mr. Wilson contends that he thought that there was either going to be a transfer of flour here, or as his counsel put it, in the vernacular, a rip-off and not a transfer of heroin.

The third and final element that you must find, if you are to convict Mr. Wilson on count 2, is that what (339) was actually transferred was heroin. I instruct you as a matter of law, that heroin is a narcotic drug controlled substance and it does not appear to be in any dispute in this case that the material which was transferred was in fact heroin, because it is stipulated, at least that if the United States chemist were called as a witness, he would testify that he analyzed the material in Exhibit 1C or 1D, whichever it is, and that it was in fact 12 per cent heroin.

But I instruct you that as a matter of law you must

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find to your own satisfaction beyond a reasonable doubt, whether the substance was heroin.

Ladies and gentlemen, I have come near to the end of my formal instructions. The most important part of this case is the part which you, now as jurors, are about to play, because it is for you and, as we have said before, for you alone, to decide whether Mr. Wilson is or is not guilty of either of the charges against him.

I know that you will try these two questions in accordance with the oath which you took as jurors, and in that oath you promised that you would well and truly try the issues joined in this case and a true verdict render based upon the evidence that you heard in this court.

You can tell, ladies and gentlemen, from the language of that oath, which is ancient language, that it (340) goes back many, many generations, as it does, about a thousand years. This is an oath to be taken terribly seriously and the issues before you are serious and I use the grave tone so that you will bear that in mind as you make the decision.

In order for you to reach a verdict of either innocence or guilt on either count, your verdict of course, must be unanimous, that is, everybody must agree to that verdict.

Each of you must decide this case individually and according to your own conscience, but only after delibera-

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tion with your fellow jurors, to determine whether you believe a just verdict is being reached.

You should not hesitate to change your mind if you become convinced that your original view of the case was not in accordance with the facts and the law. On the other hand, you should not change your mind just for the purpose of reaching a verdict as a matter of convenience.

I haven't any reason to believe that your jury won't be able to reach a unanimous verdict one way or the other, as to the matters put before you.

Nothing I have said in these instructions whatever it may be, is intended to indicate any view of mine as to how the various issues before you should be decided.

(341) I do not intend to indicate to you and I hope I have not done so. Indeed, I, like you, have not yet made up my mind as to what is the proper outcome in this case.

Ladies and gentlemen, in accordance with custom, juror number one, Mrs. Cantor, will act as your foreman. If you have any questions, or wish to have any testimony read back to you, or wish to look at any of the exhibits, Miss Cantor may simply send a written message to that effect to the marshal, who will have you in custody and will be right outside the door of the jury room, and he or she will make the necessary arrangements.

Now, ladies and gentlemen, I have come to the end of my

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instructions. I want to confer briefly with counsel in the robing room to see whether anything I have said requires clarification or amplification. That will take only a few moments. If you will wait in the jury box, we will return in just a moment.

* * *

(347) THE COURT: Ladies and gentlemen, I have received this note from you which asks for Judge Lasker's charge as to the three parts of the conspiracy and the three points of possession and distribution, and a copy of the statement to District Attorney Mukasey.

I guess you have been furnished with a statement, haven't you?

All right, you will be right away then. I thought since it is 6:30, this might be a good time anyway to get a little rest and a bite to eat and then as soon as we get back, I will give you those points. If I gave them to you now and you conferred for ten minutes, it seems to me--

THE FOREMAN: Your Honor, we think we know what your charge was, but we just wanted it clarified once again.

THE COURT: I will be very glad to tell you now. In any event, it seems to me this would be a good time for you to break. I will per perfectly glad to do it right now. I don't think it is necessary for me to refer in too much detail.

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As to the conspiracy, the first thing that you must find is that there was a conspiracy, that is, that there was a plan in this case between Mr. Wilson and somebody (348) else to break the law in regards to narcotics.

The second is that Mr. Wilson went into that plan knowing what it was all about. If you believe, for example, that he did not know that there was going to be heroin distributed, then he would not know what it was all about.

If you believe that he did, then he might know what it was all about.

The third thing is that one of the overt acts occurred and they were talking to Mr. Simpson during the actual transfer of the package and talking to the two men. That is on conspiracy.

THE FOREMAN: All three of those?

THE COURT: All three. On the substantive count, you must--let me check it out myself.

JUROR NUMBER 7: Excuse me, your Honor, on the overt act, one is enough?

THE COURT: One is enough, but there must be one.

On the substantive count, you must find all of the following:

That on the day in question, Mr. Wilson either possessed --I mean either distributed--

THE FOREMAN: All?

THE COURT'S FURTHER CHARGE TO THE JURY

THE COURT: All of the following: You must find (349) first that he either distributed or possessed with the intent to distribute, a narcotic drug controlled substance.

Secondly, again, that he did it wilfully and knowingly, that is, that he knew what he was doing and intended to do it.

And, third, that the substance that was actually transferred was actually heroin.

Are there any questions? I will be glad to answer them if there are. You must find all of those things in order to find--

JUROR NUMBER 7. Would you just repeat it?

THE COURT: Yes. That Mr. Wilson on May 21st, 1973, distributed or possessed, with the intent to distribute, something.

Second, that he did it purposely, knowing what he was doing.

And, third, that what he distributed was in fact heroin.

I really think if I didn't tell you these things you would probably be better off.

There comes common sense, if you think of that. In order to think somebody is guilty of a crime, he must possess it with intent to distribute; that he must have known what he was doing. Nobody can be guilty of a crime (350) unless

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he intends to do what he did.

And, third, in this case what he distributed, if you find that he did distribute it, was heroin.

THE FOREMAN: In both the conspiracy and in the second charge, all three?

THE COURT: Yes. The only exception to your finding everything that I have talked about is, that this gentleman pointed out, when it comes to finding the proof of an overt act in regard to a conspiracy, you need only find that one of the overt acts was actually consummated. You can find that they were all, but you only need to find one was.

THE FOREMAN: If all three on the second are one way then the conspiracy has to be --

THE COURT: That may be your conclusion. Actually, a person can, of course, commit a crime without having conspired with somebody else to do it, but in this situation the Government contends that both occurred, that he did it and that he planned with somebody else to do it.

All right?

THE FOREMAN: Yes.

JUROR NUMBER 7: The Judge suggested we break.

THE COURT: I think it is a good time. It is a (351) normal dinner time. You can come back and then start again.

I won't keep you here during dinner time.

(The jury left the courtroom at 6:40 p.m.)

(Note from the jury received at 9:05 p.m.)

THE COURT'S FURTHER CHARGE TO THE JURY

(Jury in the box at 9:28 p.m.)

THE COURT: Ladies and gentlemen, I have your second note, which is marked Court Exhibit 3. It says, "Can Judge Lasker describe possession/distribution?"

I don't know whether you want me to read what I read before, or whether it would be more helpful to you if I answer questions, but let me make a more general statement to begin with.

The time of possessing something with the intent of distributing it means that somebody either physically has in their possession--we are talking about heroin, so let's talk about that--has in their possession heroin or controls the manner in which it can be distributed and so we will call either one of those possession possesses heroin and his intent when he has it in his possession is to distribute it.

The law makes it a crime actually to distribute it--which frankly, the Government contends is what happened here. They contend that Mr. Wilson received some heroin from another person and distributed it to Mr. Simpson. But (352) the law also would make it a crime to possess it with the intention of distributing it.

Now, the concept seems simple to me and maybe there is something complicated in your mind that I don't understand,

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and if my explanation hasn't satisfied you, I think the best thing to do next would be for you to ask me a specific question.

JUROR NUMBER 7: There was a question that came up. I think I understood you previously, but the thing that came up, I think several jurors were not convinced about it. There was some discussion about the situation, was that if Mr. Wilson had apparently caused the heroin to move from one place to another, he effectively controlled it, but did not in fact ever have physical possession of it. What does that mean?

THE COURT: If you find that he controlled it, which would be constructive possession, and it was heroin and he deliberately caused it to be transferred or distributed, if you find that anybody did that, that would satisfy the requirements of charge 2 here. That is the difference between constructive possession and actual possession. Don't forget, there are three elements you must find. You must find that the defendant had the ability to cause or control distribution; that he knew what was being done, and intended to be done; that it was heroin.

Does that answer the question?

THE FOREMAN: By control, can you describe control? Total control?

THE COURT: Well, if I am in a position to order you

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to do a certain thing knowing that if I do order you to do it, you will do it and having some power of one kind or another, whether it is because I am your boss or because of one thing or another, that is control.

JUROR NUMBER 7: Do I take the question here, if it happens to be very limited control, but having a hand in it --I know this is a very vague thing--

THE COURT: That you have to decide. Control means control. Control doesn't mean having a hand in something. Control means you are the boss. Or co-boss, at least.

JUROR NUMBER 7: Okay.

JUROR NUMBER 8: Yes.

* * *

(Jury in the box at 10 p.m.)

THE CLERK: Ladies and gentlemen of the jury, please answer to your presence.

(Roll call of the jury, all present.)

THE CLERK: Mr. Foreman, have you reached a verdict?

THE FOREMAN: We have reached a verdict.

THE CLERK: How do you find for the verdict on count 1?

THE FOREMAN: We find the defendant guilty of count 1, conspiracy.

THE CLERK: How do you find the defendant on count 2?

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THE FOREMAN: We find the defendant not guilty of count 2, possession.

THE CLERK: So say you all.

THE COURT: Do you want the jury polled?

MR. ALTMAN: Yes, I would, your Honor, if I may.

THE COURT: Poll the jury.

(Jury polled, and to the question by the Clerk, "Is that your verdict", each and every juror answered in the affirmative.)

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